# ATTACHMENT 1

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| **In the Matter of** | ) | |
| | ) | **CC Docket No. 01-338** |
| **New Verizon Petition Requesting Forbearance From Application of Section 271** | ) | |

# SPRINT CORPORATION'S OPPOSITION TO PETITION FOR FORBEARANCE

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## SUMMARY

Last year, together with its comments in the Triennial Review proceeding, Verizon filed a petition asking the Commission to forbear from enforcing its unbundling obligations under section 271 of the Act in any instance where unbundling is not required after section 251 review. In the Triennial Review Order, the Commission rejected this request. On the eve of the expected denial of that petition, Verizon sought to recast its petition as a request to forbear from unbundling under section 271 of any such elements supporting "broadband" services. The Commission rightly denied the petition but nevertheless deemed Verizon's eleventh-hour request a "new" petition for forbearance. The Commission should reject this new petition as well.

The Triennial Review Order found that section 271 unbundling obligations are independent of section 251 unbundling obligations. This result is consistent with its prior landmark orders. Unbundling of the network elements on the checklist is mandatory for Bell Operating Companies if they choose to enter the interLATA long distance market, as Verizon has done. The Act makes these minimum unbundling requirements permanent, and it would make no sense for the Commission to lift these obligations after a BOC has received the long distance prize.

Regardless, the Commission lacks authority to grant Verizon's new request. Section 271(d)(4) expressly prohibits the Commission from adding or taking away from the minimum network elements Congress included on the checklist, which Verizon's petition fundamentally demands. Section 10(b) is a further legal barrier to Verizon. It

prohibits forbearance of any provision of section 271 until it and section 251(c) have been fully implemented. Contrary to Verizon's claims, that has not yet happened.

Verizon claims section 706 mandates forbearance to promote broadband investment. Section 706, however, is properly irrelevant to section 271 unbundling analysis. Verizon has not shown that forbearance would materially accelerate investment, nor that existing investment is insufficient for "reasonable and timely" deployment of advanced services. Verizon's petition, moreover, is not focused on advanced services at all, but would apply to any broadband services – which shows how far the petition overreaches. The petition also wrongly implies that broadband facilities are distinct from other facilities, when in fact they are one and the same network.

Even apart from its other legal barriers, the petition also fails to meet section 10's mandatory standards for forbearance. Verizon has not shown that section 271 unbundling for broadband services is unnecessary to ensure its charges and terms are just and reasonable and not discriminatory. Its very purpose is to block competitors, exploit its market position, and charge higher prices. Verizon has not shown that section 271 unbundling for broadband services is unnecessary to protect consumers. It claims consumers will benefit from accelerated deployment, but consumers necessarily would be harmed by fewer choices, less innovation, and less competition. Finally, forbearance would be contrary to the public interest and would harm, not enhance, the development of a competitive market. Section 271's statutory requirement of unbundled access to checklist network elements, including when used for broadband services, would in fact promote competition and investment.

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**SPRINT CORPORATION'S**
**OPPOSITION TO PETITION FOR FORBEARANCE**

On behalf of its Incumbent Local Exchange Carrier ("ILEC"), competitive LEC ("CLEC")/long distance, and wireless divisions, Sprint opposes the New Verizon Petition Requesting Forbearance from Application of Section 271,[1] which was attached to the Commission's October 27, 2003 Public Notice FCC 03-263.

## I. INTRODUCTION

On July 29, 2002, Verizon filed a petition asking the Commission to forbear, under section 10 of the Telecommunications Act of 1996, from enforcing section 271 for any network element that an incumbent local exchange carrier ("ILEC") might no longer be required to unbundled under section 251(c)(3). Verizon's petition repeated comments

[1] Verizon's new petition, as deemed by the Commission in Public Notice 03-263, includes an *ex parte* letter dated October 24, 2003 ("Verizon Letter") and an accompanying memorandum ("Verizon Memo").

it submitted in the Triennial Review proceeding,[2] where it argued that the Commission should allow Bell Operating Companies ("BOCs") to ignore their obligation to provide unbundled access to network elements on the section 271 checklist if the Commission determined that certain section network elements ("UNEs") would no longer be subject to unbundling under section 251.[3]

Verizon evidently realized that its request to ignore section 271 unbundling obligations could not be squared with the Triennial Review Order. At literally the eleventh hour, on the eve of what would necessarily have been the denial of its petition, Verizon improperly attempted to recast its petition as only "relat[ing] to the broadband elements that the Commission has found do not have to be unbundled under section 251, including fiber-to-the-premises loops, the packet-switched features, functions and capabilities of hybrid loops, and packet switching." Letter at 1.[4] Verizon wrote, "We hereby withdraw our request for forbearance with respect to any narrowband elements that do not have to be unbundled under section 251." Id.

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[2] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 ("Triennial Review").

[3] 47 U.S.C. §§ 271(c)(2)(B)(iv)-(vi) and (x). Checklist item (iv) is "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." Checklist item (v) is "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." Item (vi) is "[l]ocal switching unbundled from transport, local loop transmission, or other services." Checklist item (x) is "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."

[4] Seventeen CLEC parties understandably complained about "Verizon's attempt to manipulate the statutory deadline for Commission action." *Ex Parte* Letter of Jonathan Askin, ALTS, et al., to Marlene Dortch, FCC (Oct. 27, 2003) at 2.

The Commission could have readily denied Verizon's petition by noting that the Triennial Review Order, issued in the same docket, had decided the issue and that Verizon had failed to meet its burden of proof under section 10. Instead, after explaining that the Triennial Review Order had "rendered moot" Verizon's original petition, the Commission found that Verizon had "abandoned the core legal rationale underlying its Petition and substituted a wholly different argument for forbearance." Public Notice at 2. The Commission "therefore den[ied] the petition" – properly, in Sprint's view – but generously "cho[]se to treat Verizon's October 24 *Ex Parte* Letter as a new forbearance petition."[5]

## II. THE COMMISSION HAS ALREADY DETERMINED THAT SECTION 271 REQUIRES BOCS TO UNBUNDLE LOOP, TRANSPORT, AND SWITCHING, INDEPENDENT OF ANY SECTION 251 REQUIREMENTS.

Verizon's chief argument is the claim that forbearance would remove a "present uncertainty" about whether BOCs have a "stand-alone obligation" to provide unbundled

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[5] Verizon has appealed the denial of its original petition to the D.C. Circuit. Verizon Tel. Cos. v. FCC, Case No. 03-1396 (filed Nov. 5, 2003). While Sprint does not here quarrel with the Commission's decision to treat the letter as a new forbearance request, it is worth noting that Verizon's letter submission necessarily does not comport with the requirements of section 1.53 of the Commission's rules, and therefore the one-year deadline for action is inapplicable to the new petition.

> In order to be considered as a petition for forbearance subject to the one-year deadline set forth in 47 U.S.C. 160(c), any petition requesting that the Commission exercise its forbearance authority under 47 U.S.C. 160 shall be filed as a separate pleading and shall be identified in the caption of such pleading as a petition for forbearance under 47 U.S.C. 160(c). Any request which is not in compliance with this rule is deemed not to constitute a petition pursuant to 47 U.S.C. 160(c) and is not subject to the deadline set forth therein.

47 C.F.R. § 1.53 (emphasis added).

access to broadband facilities under section 271. Verizon Memo at 2. There is no uncertainty. In the Triennial Review Order,[6] the Commission squarely rejected Verizon's argument that 271 obligations on particular network elements parallel Commission action under section 251. The Commission reiterated that section 271(c)(2)(B) imposes an "*independent and ongoing* access obligation" for the items identified in the checklist. Triennial Review Order at ¶ 654 (emphasis added). The Commission explained further that

> [T]he requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under section 251.*

Id. at ¶ 653 (emphasis added).[7] Indeed, the Public Notice for the new petition flatly states, "[i]n the Triennial Review order ... the Commission *rejected* the argument that a finding of non-impairment under section 251 necessarily relieves a BOC of the obligation to provide access to the corresponding network element under section 271." Public Notice at 2, citing Triennial Review Order at ¶¶ 653-55.

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[6] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (rel. Aug. 21, 2003) ("Triennial Review Order").

[7] The Commission declined to require BOCs to combine network elements under section 271, and noted it had previously found TELRIC pricing need not apply to network elements provided under section 271. Sprint believes both conclusions are unwise and should be revisited.

Verizon argues that the Commission's determination to limit unbundled access under section 251 to certain broadband facilities, "such as fiber to the premises loops, the packetized functionality of hybrid loops, and packet switching" (Verizon Memo at 1) should render section 271 obligations irrelevant. In fact, the existence of the statutory obligation to provide access to broadband elements under section 271 does not "compromise" (id.) the Commission's section 251(c) determinations. The Triennial Review Order anticipates that, notwithstanding the lifting of section 251(c) obligations, BOCs would be obligated to provide competitors with wholesale access to broadband facilities on just, reasonable, and nondiscriminatory terms.[8]

> [W]e expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECS have access to copper subloops. Of course, the terms and conditions of such access would be subject to sections 201 and 202 of the Act.

The Commission reached the same conclusion in the UNE Remand Order in November 1999.[9] When the Commission determined not to require unbundling under section 251(c), in certain circumstances, of circuit switching and shared transport, it nevertheless recognized that section 271 would require unbundling independent of section 251. As it explained, "[n]onetheless, providing access and interconnection to these elements remains an obligation for BOCs seeking long distance approval." UNE

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[8] Triennial Review Order at ¶ 253.

[9] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696 (1999) (subsequent history omitted) ("UNE Remand Order").

Remand Order at ¶ 468.[10] The Commission also reinforced this finding by incorporating that determination in every grant of BOC authority to provide in-region interLATA services under section 271.

## III. VERIZON'S PETITION IS PRECLUDED BY THE ACT.

### A. The Commission Lacks Authority to Grant Verizon's Request.

Verizon's request is precluded by the Act itself. The statute expressly forbids the Commission from adding to or taking away from the mandatory elements subject to unbundling under section 271. In section 271(d)(4), Congress made clear that

> [t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).

47 U.S.C. § 271(d)(4). Verizon ignores this provision. The words "by rule or otherwise," however, are plainly broad enough to include action on a petition for forbearance. The Commission should deny the petition immediately on this basis alone.

Verizon opined that section 271 should be "read to not extend to the broadband elements of the network," and suggests that the Commission should "remove any doubt on that score." Verizon Memo at 15. Verizon belittles checklist items (iv) and (vi) as "contain[ing] very little determinate content." Id. The lack of detail in these checklist items, however, shows not that they can be narrowed, but instead that they are intentionally broad. Thus, for example, checklist item (iv) refers to "loop, unbundled

[10] Tellingly, neither Verizon nor any other party appealed that determination, and the D.C. Circuit's ruling in USTA did not affect it. USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

from local switching," without limiting it to copper loop, or narrowband loop, or even to existing plant.

Verizon points to AT&T Corp.[11] to suggest that the FCC has free rein to limit or redefine these checklist items. In fact, the court observed only that, in assessing section 271 long distance applications, the checklist review need not require BOC perfection in its provision of nondiscriminatory access to "local loop transmission." It was not an invitation to exclude whole networks from statutorily-required unbundling. Likewise, Verizon is wrong to claim that unbundling obligations under section 271 can be justified only for "'core' legacy elements." The Act is not limited to facilities, or technology (or competitors, for that matter) that existed as of 1996, or any other time. Verizon can point to nothing in the Act to justify that claim.

Turning to another legal barrier to forbearance, Verizon turns section 10(b) on its head, arguing that "section 10(d) expressly authorizes forbearance from section 271's requirements." Verizon Memo at 4. On the contrary, far from opening the door to forbearance that was already permanently shut by section 271(d)(4), section 10(d) serves only to limit Commission authority further. It provides that, where the statute does not otherwise preclude forbearance, "the Commission may not forbear from applying the requirements of section 251(c) or 271 ... until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d).

[11] AT&T Corp. v. FCC, 220 F.3d 607, 624 (D.C. Cir. 2000) (cited by Verizon Memo at 16).

Verizon asserts that section 271 must have already been "fully implemented," because the Commission granted section 271 authorizations after finding BOCs had "fully implemented the competitive checklist" under section 271(d)(3)(A)(i). Verizon Memo at 13. The full implementation of section 271, however, is obviously a much larger issue than just the momentary implementation of the checklist items. The BOCs were and are dominant in the local exchange and exchange access markets. It would make no sense for Congress to impose the market-opening requirements of section 271 unbundling on BOCs as a condition for entry into the in-region long distance market, only to allow those requirements to be removed. Congress made the permanent opening of BOC markets to be the trade-off for BOC entry into the interLATA long distance market.

Congress intended these obligations to be ongoing, because these core elements are essential to creating a market in which local competition can function.[12] The checklist requirements of section 271(c)(2)(B) – particularly items (iv)-(vii), (x), and (xii) – show that Congress concluded that these most critical network elements must be made available by BOCs on an unbundled basis, whether or not they meet the "necessary" or "impair" tests applicable to all ILECs in section 251(d)(2).[13] Congress required BOCs to provide these elements without regard to the Commission's analysis under section

[12] "[T]he competitive checklist [sets] forth what must *at a minimum* be provided by a Bell Operating Company in any interconnection agreement approved under Section 251 to which the company is a party." Sen. Rep. No. 104-23 at 43 (1995) (emphasis added).

[13] Congress required non-discriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1), but also specifically required the BOCs to make available unbundled loops; unbundled transport; unbundled local switching; access to 911/E911 services, directory assistance, and operator services; and access to databases and signaling necessary for call completion and information needed for local dialing parity.

251(d)(2). These obligations are preconditions to in-region long distance entry by the BOCs and continuing obligations after receiving such authority. That is why they are grouped with other, ongoing market opening obligations, including interconnection under section 251(c)(d); nondiscriminatory access to network elements under sections 251(c)(3) and 252(d)(1); nondiscriminatory access to BOC poles, ducts, conduits and rights of way; directory assistance and listings; interim number portability; dialing parity; and resale under sections 251(c)(4) and 252(d)(3).[14] It is for that reason that section 271(d)(6) directs the Commission to revoke long distance authority if a BOC "has ceased to meet any of the conditions required for such approval."

Indeed, Verizon's entire rationale is based on the assumption that section 251(d) – which directs the Commission to undertake its unbundling review of elements subject to section 251(c) – somehow overrides section 271. That assumption is false, whether applied to elements that can support narrow- or broadband services. If Congress intended section 251 analysis to trump the section 271 checklist, it could easily have expressly provided so. But Verizon offers no evidence of that intention. There is not even a cross reference between section 251(d)(2), which instructs the Commission how to determine when and if individual network elements must be unbundled, and items (iv) through (vi) and (x) at section 271(c)(2)(B). That makes sense, both because section 271's "competitive checklist" serves a difference purpose than section 251(d)(2) and because it applies to a different and narrower group of carriers – BOCs, distinct from all other ILECs. The presence of checklist item (ii) – which requires "nondiscriminatory access to

[14] See 47 U.S.C. §§ 271(c)(2)(B)(i)-(iii), (vii)-(Viii), (xi), and (xii-xiv).

network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1)" – also shows that sections 251(d)(2) and 271(c)(B) serve different purposes.

**B. Section 706 is Irrelevant to Section 271 Unbundling Requirements.**

Verizon asserts that section 706[15] of the Act "all but compels forbearance" from its obligations under section 271 to unbundled broadband elements that the Commission has exempted from unbundling under section 251. Verizon Memo at 8. Leaving aside whether the Commission's action in exempting broadband elements from unbundling under section 251 was appropriate from a legal or policy perspective, section 706 is necessarily irrelevant to the scope of a BOC's access obligations under section 271.

In the Triennial Review Order, the Commission concluded that section 706 was relevant to section 251 unbundling analysis only because the "at a minimum" clause of section 251(d)(2) gave the Commission authority "to take Congress's goals into account" in deciding which elements must be unbundled. Triennial Review Order at ¶ 176. Section 271 has no "at a minimum" clause. Instead, section 271(d) expressly prohibits the Commission from altering, "by rule or otherwise," the list of network elements that BOCs must make available.

In any event, Verizon reads section 706 too carelessly. It is not a "specific statutory mandate" (Verizon Memo at 7) to embrace any action that might accelerate expansion of broadband facilities. Rather, it asks the Commission only to "encourage the deployment on a reasonable and timely basis of advanced telecommunications

[15] Section 706 is codified in a footnote to the Act. 47 U.S.C. § 157 nt.

capability." 47 U.S.C. § 157 nt. Sprint believes such investment is already progressing, and will continue to progress, "on a reasonable and timely basis" even with section 271 unbundling requirements in place.[16] If it would not, Congress itself would have provided BOCs the exemption Verizon seeks. But even if one assumed that forbearance would accelerate investment, Verizon has not shown that such forbearance is *necessary* for "reasonable and timely" deployment.

Verizon also conspicuously fails to limit its request to "advanced telecommunications capability," but instead uses the conveniently ambiguous term, "broadband." In RFPs for equipment manufacturers, the BOCs have called for data speeds of 622 mbps downstream and 122 mbps upstream. The Commission has described "advanced communications capability" as encompassing simultaneous voice, high-speed data, and full motion video. Verizon sets no standard at all. It does not even expressly limit its request to the mass market. The petition would stretch section 706 far beyond any allowable bounds.

[16] Despite a difficult economy and all the purported regulatory disincentives of unbundling, in 2002 Verizon alone invested $12 billion to upgrade its networks for higher speed capability, adding 400,000 miles of fiber and extending xDSL capability to 60% of its lines. Verizon 2002 Annual Report at 2, 4. Even before the Triennial Review Order was released, Verizon had announced plans to extend broadband capacity to 80% of its lines by the end of 2003, committing to "aggressive network expansion and in new technologies ... to compete with cable providers. See, e.g., Verizon Investor Relations, "Verizon Supercharges DSL" (May 13, 2003).

## IV. THE PETITION FAILS TO MEET SECTION 10'S REQUIREMENTS FOR FORBEARANCE

Under section 10(a) of the Act, the Commission may forbear from applying requirements of the Act of its implementing regulations only if the petitioner proves three criteria are met:

> (a) enforcement is not necessary to ensure that the charges and practices of the carrier are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (b) enforcement is not necessary to protect consumers; and
>
> (c) forbearance is consistent with the public interest.

47 U.S.C. § 160(a). To limit Commission discretion further, section 10(b) requires that, in considering the public interest under section 10(a)(3), "the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will *enhance* competition...." 47 U.S.C. § 160(b) (emphasis added). Where the effect on competition may be harmful, the Commission must deny forbearance even if the individual threshold requirements of section 10(a) arguably have been met. In this case, even apart from the other legal barriers to forbearance,[17] this simply underscores that Verizon's petition cannot be granted.

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[17] Even "a strong public interest showing can not overcome a failure to demonstrate compliance with one or more checklist items. The Commission is specifically barred from 'limit[ing] ... the terms used in the competitive checklist,' or forbearing from requiring compliance with all statutory conditions under section 271." Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd 3953 at ¶ 424 (1999) (footnotes omitted, citing 47 U.S.C. §§ 160(d), 271(d)(4)).

**A. Verizon has not established that section 271 unbundling for broadband competition is not necessary to ensure just and reasonable charges and practices and to guard against discrimination.**

The BOCs remain overwhelmingly dominant in the local exchange and exchange access markets in which they are the ILEC. CLECs hold just 13% of access lines,[18] and IXCs must rely on BOCs for the vast majority of their exchange access.[19] BOCs enjoy vast, contiguous service territories, immense scale, and a huge customer base and network made possible by decades of monopoly status.[20] They also have shown a pattern of resisting competition in violation of the Act's requirements. Together, they have been assessed fines, penalties, and compelled refunds of over $2.1 billion for market misconduct and violations of statutory obligations, merger conditions, and conditions of section 271 approvals.[21] Verizon alone has incurred more than $300 million in such penalties.[22] Verizon has been repeatedly fined, in particular, for its continuing unwillingness to meet wholesale service standards that are essential to local competition. And just this month Verizon was ordered to pay more than $12 million to Starpower – a broadband competitor – for violations of its interconnection agreement and consequent

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[18] Local Competition Status as of Dec. 31, 2002, Industry Analysis Div., Common Carrier Bureau (June 2003) at Tables 1, 2.

[19] See Comments of Sprint Corp., Performance Measurements and Standards for Interstate Special Access Services, CC Docket No. 01-321, at 4 (Jan. 22, 2002); Comments of AT&T Corp., Review of the Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket No. 01-337, at 28 (Mar. 1, 2002).

[20] They are also among the largest corporations in the nation. Verizon alone reported $68 billion in revenue last year.

[21] The competition advocacy group, Voices for Choices, maintains a running tally of these penalties. See "Bell Fine Watch" at *http://www.voicesforchoices.com.*

[22] Id.

unlawful failure to provide interconnection on just, reasonable, and nondiscriminatory terms.[23]

The Commission and many state commissions have found these recurrent enforcement measures necessary to protect the competitive marketplace, to protect consumers, and to protect the public interest. They establish that the BOCs have imposed and continue to impose "charges, practices, classifications, or regulations" that are unjustly and unreasonably discriminatory and that Section 271 checklist protections remain necessary for "the protection of consumers" and to promote "the public interest." 47 U.S.C. § 160(a).

The enormous market advantages enjoyed by BOCs, and the risks they pose to the marketplace, apply to broadband just as readily as to narrowband services. By securing this regulatory protection, Verizon would be in a position to exploit its duopoly status in some markets – and its monopoly status in others – to establish retail rates and practices without the full competitive check that the Act clearly intends to bring about.

Verizon asserts that there can be no "market leveraging concerns' because it claims the BOCs "are not remotely dominant in the market for those [broadband] services." Verizon Memo at 18. This view, however, takes a short-term view of the marketplace – one that has no support in the Act. It ignores Verizon's ability to exploit its dominance in the local exchange and exchange access markets to build a dominant position in the broadband market. Congress understood that the BOC monopolies were

[23] Starpower Comms., L.L.C. v. Verizon South, Inc., File EB-00-MD-19, FCC 03-278 (rel. Nov. 7, 2003).

about more than just the "historical legacy voice networks" (Verizon Memo at 4) they owned. The Act was a response to and a replacement for the AT&T Modification of Final Judgment,[24] and, as the Supreme Court explained, its requirements "were intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises...."[25] Congress made competitors' access to BOC networks – and not merely to their legacy plant – the price for their entry into the interLATA long distance market. Section 706, a footnote in the Act, was not intended to trump that fundamental, structural requirement.

### B. Verizon has not established that section 271 unbundling for broadband competition is not necessary to protect consumers

Verizon says nothing about the protection of consumer interests. It merely asserts that by protecting BOCs from their statutory unbundling obligations under section 271, they "can get on with the business of designing and deploying next generation broadband networks in a rational and efficient matter [sic]." Verizon Memo at 19. Verizon expects the Commission to accept this assumption of accelerated investment purely on faith. With competitors completely barred from wholesale access to unbundled network elements for broadband services, Verizon says, "consumers will be the ultimate beneficiaries." Id. This, too, Verizon expects the Commission to take on faith.

Remarkably, no consumer representatives have endorsed this BOC view, no matter how eager they may be to see the expansion of broadband services. That makes sense. Even if one assumed, for purposes of argument, that BOC investment in

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[24] United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[25] Verizon Comms. Inc. v. FCC, 122 S. Ct. 1646, 1654 (2002).

broadband facilities would be materially greater (which Sprint disputes), it does not follow that section 271 unbundling is unnecessary to protect consumers. What Verizon seeks, openly, is protection from competition – the ability to exclude competitors and thus largely limit the market, at best, to a duopoly of cable and BOC providers. Although Verizon says "CLECs are just as capable as the BOCs of building new fiber out to customer premises" (Verizon Memo at 19), denying all access to BOC facilities would require competitors seeking to enter the market to build entire networks before having a single broadband customer. Meanwhile, Verizon enjoys a BOC's ability to leverage its huge legacy customer base, gained through decades of monopoly status, by bundling services. Congress recognized that competition is necessary to protect consumers, which is why it incorporated the BOCs' independent unbundling requirement in section 271 and prohibited the Commission from altering it.

Ironically, for a BOC that complained in the Triennial Review about CLECs' potential ability to cherry-pick its most profitable customers, the whole purpose of excluding wholesale access to broadband facilities is to ensure that Verizon can target those customers without the full pressures of competition. Verizon implies that competition with cable TV broadband providers alone is sufficient to ensure that rates and practices are just and reasonable. Verizon Memo at 18. Yet, not only is the cable TV industry making comparatively slow entry into the voice market, it cannot offer the full range of bundled services that the BOCs are deploying, particularly DS3 and higher capacities. With the competitive pressures of unbundling removed, and with only a limited duopoly check, Verizon would have less pressure on its price and services.

Forbearance therefore could only *harm* consumers. It would block new entrants and discourage competition by requiring CLECs to build their own facilities, something Congress did not intend.[26] It would limit consumer choices, chill innovation, and increase costs for consumers. It would grant BOCs a measure of market power that the Act was clearly intended to dilute.

### C. Forbearance would be contrary to the public interest and would harm competition.

Verizon claims the need for this protection is "urgent" (Verizon Letter at 1), because "investment disincentives" (Verizon Memo at 10) are preventing it from making adequate investment in broadband and next generation networks. Verizon scarcely needs the anticompetitive protection for broadband that it seeks. Even while the rest of the industry is suffering an extraordinary downturn, the BOCs are already investing in broadband capabilities at a very healthy rate, despite the supposed "uncertainty and financial risk" that Verizon argues currently "undermine[s] deployment." Verizon Memo at 11. The BOCs are rapidly gaining market share and are quickly closing the gap with cable TV companies even in a stand-alone the broadband market, due to their already accelerated investment in xDSL services. Moreover, if the competitive threat posed by cable TV providers is as acute as Verizon implies, the BOCs already have full incentive to invest, without some artificial and anticompetitive subsidy.

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[26] See Verizon, 122 S.Ct. at 1662, 1664 (noting that the Act does not envision or require any threshold investment in facilities by requesting carriers).

The entire argument that the statutory section 271 unbundling requirements somehow unduly discourage investment lacks credibility. There would be no legitimate reason why Verizon should not be happy to provide wholesale access to broadband facilities. The additional revenues, increased utilization, and lowered unit costs would enable it to expand its network, and its market, faster and at lower cost. In drafting the Act, and section 271 in particular, Congress was looking to the model of the long distance market. In that market, carriers were ordered – at a time when AT&T was dominant – to make their services and facilities available for resale to allow competition to develop. Today, IXCs willingly sell to resellers and avidly compete for wholesale business; no IXC is seeking to have this requirement lifted. Unless Verizon has other, anticompetitive objectives, it should be eager to maintain these checklist items indefinitely.

Verizon's rationales for wanting to block access to these elements are weak. Its main argument is that making these networks accessible to competitors would require "costly redesign of networks," introduce "inherent inefficiencies," and require "development of ... systems to cope with the complex requirements of unbundled access." Verizon Memo at 10, 11. However, all ILECs are already subject to these requirements under section 251, in addition to their interconnection obligations generally. And the Commission must realize that broadband and narrowband facilities are not separate from one another. Next generation networks are not built in parallel with narrowband networks, but are upgrades of existing networks. There are no "old wires" and "new wires;" these networks are actually one and the same. Thus, any marginal

burden for broadband is surely limited, and surely insufficient to justify such anticompetitive results. Moreover, failing to design accessibility to unbundled network elements for broadband would necessarily mean designing networks to frustrate access to unbundled network elements for non-broadband services. That plainly would be contrary to the Act and to the Triennial Review Order's prohibition against engineering networks to frustrate competitors' access to network elements under sections 251 and 271. Triennial Review Order at ¶ 294.

Verizon next argues that "[e]xperience has proven that unbundling obligations evolve over time as they are further defined and interpreted," with the results that "ILECs have been subject to a constantly shifting range of requirements implementing ... unbundling requirements." Verizon Memo at 11. Verizon has less cause to complain about a shifting regulatory environment than CLECs; new entrants are obviously more vulnerable to changing regulatory winds than the massive BOCs. Verizon also voices fear that "although TELRIC rules do not apply to elements unbundled under section 271 alone, the potential for intrusive regulatory involvement in the pricing of these elements remains." Verizon Memo at 11. Why? Verizon fears "other parties will ... try to game the regulatory process, either to pre-empt the negotiations entirely or to obtain extra leverage." Id. Coming from a BOC that the Enforcement Bureau had just found, in interconnection arbitration, had stonewalled a voice and broadband competitor for years,[27] the argument is as ironic as it is weak.

[27] See n.23, supra.

## V. CONCLUSION

The Commission properly denied Verizon's original petition. Narrowing Verizon's request to broadband facilities does not change the result. Verizon's new petition is contrary to the statute, contrary to Congressional goals, contrary to Commission's prior readings of Section 271, and contrary to the stringent standards of Section 10.

Respectfully submitted,

SPRINT CORPORATION

By _____

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November 17, 2003

# ATTACHMENT 2

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | **CC Docket No. 01-338** |
| **New Verizon Petition Requesting Forbearance From Application of Section 271** | ) | |

# SPRINT CORPORATION'S REPLY

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November 26, 2003

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**SPRINT CORPORATION'S REPLY**

Sprint Corporation ("Sprint"), on behalf of its Incumbent Local Exchange carrier ("ILEC"), competitive LEC ("CLEC")/long distance, and wireless divisions, replies to the oppositions and comments filed by other parties in response to the New Verizon Petition Requesting Forbearance from Application of Section 271.[1]

## I. INTRODUCTION AND SUMMARY

The petition prompted ten sets of comments. Seven filings – representing 32 competitive carriers – opposed the petition. Three filings – two Bell Operating Companies ("BOCs") and a union claiming to represent BOC employees – supported it. All of the non-BOC parties agree that Verizon's "new" petition must be denied. They

[1] Verizon's new petition, as deemed by the Commission in Public Notice 03-263, was filed October 24, 2003 and attached to the Commission's October 27, 2003 Public Notice FCC 03-263. Oppositions and comments were filed on November 17, 2003.

explain that the Commission has already recognized that section 271 imposes separate and ongoing obligations on BOCs to unbundle listed network elements, whether they support narrow- or broadband services. They also show that forbearance is precluded by the text, objectives, and structure of the Act, and that section 706 is inapplicable and cannot justify Verizon's request in any event. Verizon's few supporters object to BOCs being treated differently from other ILECs, but Congress imposed section 271 as the price for long distance market entry, and did so for good reasons. On the whole, the comments show that Verizon has failed to prove it meets the demanding requirements of section 10. Section 271 unbundling of broadband elements remains necessary to protect the marketplace, consumers, and the public interest.

## II. THE COMMISSION HAS ALREADY DETERMINED THAT SECTION 271 IMPOSES A SEPARATE AND ONGOING UNBUNDLING OBLIGATION ON THE BOCS.

Verizon's petition is based on a "false premise" because "[t]he Commission's decision not to require ILECs to unbundled certain broadband network elements under section 251 does not affect Verizon's obligation to make those same network elements under section 271 of the Act." PACE at 7-8. The Commission recognized that "the plain language and structure of section 271(c)(2)(B) establishes that BOCs have an *independent and ongoing access obligation* under section 271." Triennial Review Order at ¶ 654 (emphasis added). "The Commission has spoken unmistakably" on this issue.

Covad at 2. See Triennial Review Order[2] at ¶¶ 253, 653-655; Public Notice at 2; UNE Remand Order[3] at ¶ 468.

Qwest claims that "establishing an independent and ongoing unbundling obligation under section 271 with respect to broadband elements is fundamentally inconsistent with the Act" and "contrary to the Act's objective of stimulating facilities-based competition." Qwest at 2. This is a misstatement of the Act and of Congress's goals. First, it is not the Commission that is "establishing" the obligation to unbundle broadband elements. As the Commission recognized, it is "established" by the Act itself. Triennial Review Order at ¶¶ 653, 654. Second, "the fundamental objective of the 1996 Act" is not investment in BOC facilities but to "bring consumers ... in all markets the full benefits of competition."[4] The Supreme Court observed that the Act, in pursuing that goal, envisions access to unbundled network elements as one means for competition and requires no threshold investment in facilities.[5] Qwest cites USTA and Iowa Utilities

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[2] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (rel. Aug. 21, 2003) ("Triennial Review Order").

[3] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696 (1999) (subsequent history omitted) ("UNE Remand Order").

[4] Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, *Memorandum Opinion and Order*, 14 FCC Rcd 16252 ¶ 46 (1999). See MCI at 9.

[5] Verizon Comms. Inc. v. FCC, 122 S. Ct. 1646, 1662, 1664 (2002).

Board as opposing "open-ended" unbundling.[6] These decisions, however, focused on the Commission's prior section 251 analysis. They did not deal with, and are not relevant to, section 271 obligations.

Indeed, although Qwest claims it is "illogical" to read section 271 as an ongoing obligation for BOCs (Qwest at 11), Congress understood that, in a competitive market, BOCs should be content to provide such wholesale access indefinitely. Congress was looking to the model of the long distance market, in which carriers were ordered make their services and facilities available for resale and today compete vigorously for wholesale business. Sprint at 18. Like Verizon, Qwest simply wants to avoid its section 271 obligations for broadband in order to exploit its dominance in its local exchange markets with bundled services. Even most cable TV broadband providers cannot offer all of the voice, data, and broadband services that a BOC can bundle. Sprint at 16.

SBC claims that "the Commission has consistently held that the scope of the unbundling obligations under the Competitive Checklist is no more extensive than the scope of those same obligations under section 251." SBC Att. at 1-2, citing section 271 application orders. Actually, the orders instead reflect only that the Commission cannot impose additional unbundling requirements as a condition of section 271 authority. That is dictated in part by section 271(d)(4)'s prohibition of any changes – additions or subtractions – to the competitive checklist, including in particular items (iv)-(vi) and (x). Similarly, Qwest is wrong to assert that the Act "contemplates removal of the section 271 unbundling obligation once the corresponding section 251 unbundling obligation has

[6] USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002) and AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999), cited by Qwest at 7-8.

been removed," ostensibly because sections 251 and 271 serve a "common purpose." Qwest at 9, 10. The Act imposed ongoing unbundling under section 271 as the price for any BOC that wanted to enter the in-region interLATA long distance market. If unbundling obligations were the same under sections 251 and 271, Congress would have simply stopped the checklist at item (ii). Covad at 4.

SBC and Qwest also join Verizon in some revisionist history. They claim section 271 "was intended to provide market-opening requirements in the event an application for section 271 relief *preceded* Commission unbundling rules" promulgated under section 251. SBC Att. at 2 (emphasis in original); Qwest at 11. The Act does not limit section 271 in this way, and SBC and Qwest offer no evidence to back their claim. Congress surely expected section 251 unbundling rules would precede any grants of section 271. No BOC would be ready to meet all section 271 requirements immediately, and the Commission acted promptly to issue section 251 unbundling rules. Indeed, the first section 271 application was not even filed until nearly six months after the Commission issued its section 251 unbundling rules.[7] The first grant of authority under section 271 issued more than two years after the Commission issued rules implementing section 251.[8]

The competitive carriers effectively rebutted Verizon's claim that section 271 was not meant to apply to "broadband" facilities. MCI at 25-26. See also AT&T at 26-30; Z-

[7] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499 (1996) (subsequent history omitted).

[8] Ameritech's application for Michigan was filed January 27, 1997, but withdrawn February 11, 1997. The first BOC application was approved – Verizon's for New York – only on December 22, 1999.

Tel at 7-12; PACE at 11, Allegiance at 4. CWA (at 5) claims section 271 "was never designed to interfere with a Bell company's deployment of an advanced ... network," but was intended only "to open up the Bell companies' legacy circuit switched network." See also SBC Att. at 13. But there is no basis in the Act for this claim. The D.C. Circuit has recognized that no exception can be read into the Act for "broadband."[9]

Thus, section 271 is not limited to "core legacy systems that make up the traditional local telecommunications network." SBC Att. at 13. It is not limited to facilities or even technologies that existed in 1996. Indeed, it could not reasonably be so limited, because there are no separate voice and broadband networks – no "old wires" and "new wires." These networks are one and the same. MCI at 20-21; Sprint at 11. Furthermore, the wording of the checklist is broad, and given the market-opening purposes of the Act, intentionally so. By its plain language, competitive "access" certainly encompasses broadband and narrowband facilities, including all features, functions, and capabilities. SBC, Qwest, and CWA -- like Verizon – can point to nothing in the Act that would justify any narrower reading.

[9] ASCENT v. FCC, 235 F.3d 662, 668 (D.C. Cir. 2001) (noting the Commission "concedes" that "Congress did not treat advanced services differently from other telecommunications services.").

## III. VERIZON'S PETITION IS PRECLUDED BY THE ACT.

### A. The Commission lacks authority to grant Verizon's request.

The competitive carriers emphasized that the Commission lacks authority to grant the forbearance sought by Verizon. AT&T at 7-9; MCI at 11-12; PACE at 23; Sprint at 6. In section 271(d)(4), Congress specifically forbade "the Commission to alter the section 271 checklist – whether "through forbearance or any other means." Covad at 3.

> The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).

47 U.S.C. § 271(c)(2)(B). The language is clear. SBC, Qwest and CWA – like Verizon – simply ignore this statutory requirement.

Even apart from the absolute bar in section 271(d)(4), the competitive carriers show that section 10(d) precludes forbearance because section 271 has not yet been fully implemented. Allegiance at 7-9, AT&T at 9-16; MCI at 16-19; Z-Tel at 12-15; Sprint at 7-9, citing 47 U.S.C. § 160(d). Covad explains (at 5), "Verizon's construction of the statute pays lip service to this requirement, but fails to render it meaningful in any sense." Section 271 sets out the requirements that must be met if a BOC wishes to enter the in-region interLATA long distance market. In Verizon's view, to enter the interLATA markets, "a BOC would simply have to demonstrate its compliance with the checklist provisions of section 271 for one brief, shining moment." Id. SBC and Qwest take the same unsupportable position.

Given the market opening goals of the Act,[10] and the obvious Congressional concern about BOC market dominance, such a construction of section 271 would make no sense. Section 10(d) requires not just that the checklist be "fully implemented" when a BOC submits an application under section 271, as section 271(d)(3)(A)(i) does. It requires that all of section 251(c) and section 271 be "fully implemented" before the Commission may exercise forbearance on any aspect of either section's requirements. Those sections are not yet "fully implemented" simply because a BOC has received long distance authority, whether or not a given network element has been removed from unbundling under section 251(d)(2). Cf. Qwest at 15-16, SBC Att. at 7-8. These sections are "fully implemented" when competitive market conditions are such that they are no longer needed.[11] AT&T at 15-16. That trade-off was the price BOCs were to pay for entry into the interLATA long distance market.

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[10] Sections 251(c) and 271 are "cornerstones of the framework Congress established in the 1996 Act to *open local markets to competition*." Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 24012 at ¶ 73 (12998) (subsequent history omitted) (emphasis added).

[11] Consistent with its purpose, section 271 contains no time limit whatever. In denying another Verizon petition, addressing section 272's separate affiliate requirements, the Commission found that section 271 "incorporat[es]" section 272's requirement that a BOC "maintain the affiliate structure for *at least* three years" after receiving section 271 authority in each state. Sprint believes the Commission was mistaken to find these safeguards can be lifted at all, but if "section 272 cannot be deemed to have been 'fully implemented' until this three-year period has passed," then certainly SBC and Qwest cannot fairly argue that section 271 is "fully implemented" immediately upon receiving long distance authority. Petition of Verizon for Forbearance From the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under § 53.203(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, FCC 03-271 (rel. Nov. 4, 2003) at ¶¶ 6, 7 (emphasis added).

**B. Section 706 is irrelevant to section 271 unbundling requirements.**

SBC, Qwest, and CWA echo Verizon's assertion that section 706 is a "statutory mandate" to encourage investment in broadband and next-generation facilities. SBC argues that it compels the exercise of ... forbearance authority to ensure that any section 271 unbundling obligations do not undo the Commission's Triennial Review efforts to free broadband from unbundling." SBC Att. at 12.

Sprint and the competitive carriers dispute the contention that forbearance would accelerate BOC investment. By removing competitive pressures, it would just as likely retard investment by CLECs and BOCs alike. Z-Tel at 21. Regardless, however, the Triennial Review Order concluded that section 706 was relevant to section 251 unbundling analysis only because the "at a minimum" clause of section 251(d)(2) gave the Commission authority "to take Congress's goals into account" in deciding which elements must be unbundled. Triennial Review Order at ¶ 176. Section 271 has no "at a minimum" clause. Instead, section 271(d)(4) expressly prohibits the Commission from altering or limiting the list of BOC network elements that requesting carriers may access. Thus, "section 706 does not grant the Commission authority to review 271 unbundling obligations." Allegiance at 9. See also MCI at 11-12; Sprint at 10.

SBC, Qwest, and CWA also read section 706 too expansively. Codified in a footnote to the Act, section 706 does not authorize any action that might bolster BOC investment in broadband facilities. It merely asks the Commission to "encourage the deployment *on a reasonable and timely basis* of advanced telecommunications capability." 47 US.C. § 157 nt. (emphasis added). Forbearance is not "necessary" for

"reasonably and timely" deployment, because such investment is already progressing healthily even with section 271 unbundling requirements in place. Like Verizon, SBC and Qwest are already investing vigorously in expanded xDSL facilities, and were doing so long before the Triennial Review concluded.

SBC attempts to justify Verizon's petition (and its own) by pointing to the Commission's determination that BOCs do not have a "first mover advantage in greenfield settings." SBC Att. at 13-14, citing Triennial Review Order at ¶ 275. Rather than bolster the BOCs' position, this simply underscores how Verizon has not limited its own petition to greenfield settings, or to FTTH, or even to the mass market. These BOCs have not even limited their argument to "advanced telecommunications capability." Section 706 could never justify such overreaching.

## IV. CONGRESS PROVIDED THAT BOCS MUST BE SUBJECT TO UNBUNDLING OBLIGATIONS UNDER SECTION 271 AS A CONDITION FOR LONG DISTANCE MARKET ENTRY.

SBC and Qwest also repeat the BOCs' lament – previously heard and rejected by the Commission – that having to unbundle any network elements under section 271 unfairly singles out Bell Operating Companies. SBC and Qwest – like Verizon – object to being treated differently than other ILECs. Qwest (at 11-12) argues it would be "irrational ... to remove unbundling obligations for ILECs under section 251, yet keep unbundling obligations in effect for the identical network elements under section 271 for the BOCs, which cover some 80% of all local access lines." But Congress specifically directed that the BOCs must unbundled network elements under section 271 if they chose to enter the in-region interLATA long distance market, as all have done. It would be

irrational, and unlawful, for the Commission to attempt to remove these statutory conditions.

Congress explicitly differentiated between BOCs and other ILECs and had obvious and legitimate reasons for doing so. MCI at 8-9. The Act was a response to and a replacement for the AT&T Modification of Final Judgment,[12] and the Supreme Court emphasized that the Act's requirements "were intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises...." Verizon, 122 S. Ct. at 1654. The BOCs nevertheless challenged the Act, and section 271 in particular, on Constitutional grounds. Ultimately, they lost those appeals.[13]

Congress imposed these "separate and ongoing" section 271 unbundling requirements on the BOCs, because it recognized they were and would likely long remain overwhelmingly dominant in the local exchange and exchange access markets in which they are the ILEC.[14] They would have the incentive and the ability to adversely affect long distance competition and to frustrate the development of local competition, a prediction that the last seven years has indeed borne out.[15] Other ILECs, in contrast, do

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[12] United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[13] See SBC Comms. v. FCC, 154 F.3d 226, 246 (5th Cir. 1998), cert. denied, 525 U.S. 1113 (1999); BellSouth v. FCC, 162 F.3d 678, 691-92 (D.C. Cir. 1998).

[14] See BellSouth Corp. v. FCC, 162 F.3d 678, 691 (D.C. Cir. 1998) ("Congress clearly had a rational basis for singling out the BOCs, *i.e.*, the unique nature of their control over their local exchange areas.").

[15] See Sprint at 13-14.

not have this market power. Because of their much smaller scale and geographically dispersed (and largely rural) local operations, they are not in the same position as the BOCs to adversely affect interexchange competition.[16] For the same reasons, Congress also imposed on the BOC affiliates (including broadband and long distance affiliates) additional express requirements to help protect the development of competition, among them section 272's requirement that BOCs "operate independently" and submit to, publish, and pass biennial audits.

So while SBC claims Congress "cannot be thought to have intended that the limits on unbundling in section 251(d)(2) applied *only* to the incumbent LECs that happen not to be Bell operating companies," in fact Congress applied 251(d)(2) to all ILECs but, for compelling reasons, imposed these additional, ongoing section 271 unbundling obligations on any BOC entering the interLATA long distance market. These include not only "nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252 (d)(1)" -- 47 U.S.C. section 271(c)(2)(B)(ii) -- but also unbundled loop, transport, and switching, as well as nondiscriminatory access to signaling and databases for call completion. 47 U.S.C. section 271(c)(2)(B)(iv)-(vi), (x). Indeed, if the BOCs' view were correct, Congress would not have needed to enact those additional, detailed subsections; BOC obligations would have stopped at checklist item (ii). Covad at 4. Nor would Congress have found it necessary to add section 271(d)(4), which imposes an express "limitation on [the] Commission," which provides that "[t]he Commission may not, *by rule or otherwise*, limit or extend" the obligations set out in

[16] See MCI at 8.

subsection (c)(2)(B) for any BOC seeking "entry into interLATA services." 47 U.S.C. section 271.

## V. THE PETITION FAILS TO MEET SECTION 10'S REQUIREMENTS FOR FORBEARANCE.

The competitive carriers agree that "Verizon has failed to satisfy the explicit statutory criteria" for forbearance under section 10." PACE at 11. Indeed, Verizon's petition actually "nowhere mentions the effect of the requested forbearance on competition, as the Commission is required to consider under section 10(b)." MCI at 9. SBC and Qwest, moreover, are unable to make up for the petition's deficiencies.

### A. Verizon has not established that section 271 unbundling for broadband competition is not necessary to ensure just and reasonable charges and practices and to guard against discrimination.

SBC briefly argues that where the Commission has not required unbundling under section 251(d)(2), "it follows that unbundling is not necessary to ensure that the telecommunications service the ILEC provides with that element is available on just and reasonable as well as not justly or unreasonably discriminatory terms." SBC Att. at 5. See also Qwest at 14. SBC contends that a non-impairment finding necessarily means there is "competitive supply ... which ensures that the element in question is not a bottleneck" and thus "ensures[s] that the resulting service is itself subject to competition." Id., citing Triennial Review Order at ¶ 84. Blocking competitors access to broadband capabilities of BOC networks, however, would require CLECs to build networks before serving a single customer, which would frustrate market entry and allow the BOCs to impose unjust and unreasonable rates. And by definition, denying

competitors access to broadband capabilities would necessarily mean BOC discrimination against competitors and in favor of their own broadband affiliates. AT&T at 2-1; Covad at 8. And the record is replete with evidence of the BOCs' abuse of competitors, made possible by the continued market dominance that section 271 was designed to dilute. Sprint at 13-14.

SBC and Qwest point vaguely to availability of cable TV-based broadband services. SBC Att. at 14; Qwest at 14. To begin with, cable systems do not reach all consumers; they commonly do not reach business districts where demand for broadband services is highest. Even where cable-TV systems operate, however, the BOCs would merely create a duopoly – something "patently insufficient to establish that the BOCs would be *forced* to offer access to their broadband facilities at just and reasonable terms and conditions – i.e., that the BOCs lack market power in the provision of broadband services." AT&T at 21-22. It is worth noting that the Commission rejected the EchoStar-DirecTV merger on public interest grounds, because "a merger to duopoly ... faces a strong presumption of illegality," not least because such a merger would "inevitably result in less innovation and fewer benefits to consumers."[17]

## B. Verizon has not established that section 271 unbundling for broadband competition is not necessary to protect consumers.

SBC and Qwest, like Verizon, naturally say nothing about the need for competition to protect consumers. SBC again simply asserts that a non-impairment

[17] EchoStar-DirecTV Merger Order, 17 FCC Rcd 20559 at ¶ 103 (2002) and Separate Statement of Chairman Powell at 1.

finding under section 251(d)(2) automatically means consumer interests can subsequently be ignored. AT&T, however, explains that "[w]ithout the provisions of section 271 that Verizon seeks to avoid, competition in the provision of broadband and next-generation services will be severely impeded." AT&T at 22. SBC claims that unbundling under section 271 is "plainly unnecessary" to protect consumers, because a non-impairment finding under section 251(d)(2) necessarily means the element is "capable of 'competitive supply.'" SBC Att. at 5. Without access on a wholesale basis to broadband and next-generation capabilities of the BOC networks, however, forbearance would certainly lead to fewer choices and higher rates for consumers. Competitors cannot replicate the BOCs' ubiquitous plant, and SBC's reasoning would require that they build an entire network before they can win even their first customer. For the bundled voice and broadband services that customers increasingly demand, BOCs would be monopoly providers of service. Even in those limited areas where cable TV companies offer combined telephony and broadband services, consumers would be subject, at best, to duopoly. AT&T at 23.

SBC and Qwest repeat Verizon's bold assertion that consumers will benefit from removing section 271 unbundling obligations by the supposed increased BOC incentive to invest in broadband and next-generation facilities. SBC Att. at 9; Qwest at 14. In effect, they argue that section 271 unbundling should be lifted for the same reasons that section 251(c) unbundling was. Their argument makes no sense. The Commission declined to subject checklist items to TELRIC, and instead required only that such section 271 elements be provided in compliance with the "just and reasonable" and

"nondiscrimination" requirements of sections 201 and 202. Triennial Review Order at ¶ 663. SBC and Qwest, like Verizon, fail to explain why providing wholesale access under section 271 to broadband elements on these terms would diminish BOC incentives to invest. The BOCs had already promised the Commission that they intend to offer competitors access to broadband network capabilities at market terms. Triennial Review Order at ¶ 253 & n.755. The BOCs also ignore the fact that the petition seeks forbearance from imposing statutory requirements on hybrid loop investment that the BOCs *have already made*, which can hardly affect any future investment incentives. AT&T at 25.[18]

### C. Forbearance would be contrary to the public interest and would harm competition.

Covad noted that "it is particularly instructive that the third prong of Congress' forbearance standard explicitly *requires* the Commission pursuant to section 10(b) to determine whether or not forbearance *promotes competition* in its analysis of whether forbearance would be in the public interest." Covad at 8 (emphasis in original). In contrast, Verizon's petition would thwart competition for broadband services.

Like Verizon, SBC and Qwest focus not on the pro-competitive, public interest requirements of the Act, but on supposed burdens of compliance with section 271, now that they have received the interLATA long distance authority for which section 271's independent and ongoing obligations were the price. Qwest at 12; SBC Att. at 10. They

[18] See also AT&T Reply Comments, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, at 79-80 (July 17, 2002).

provide no detail, however, about these supposed "substantial and unjustifiable operating and financial burdens." Qwest at 12.

In fact, the BOCs pretend there is "massive uncertainty" (SBC Att. at 3), but they have long understood that unbundling of these broadband capabilities would be required. Verizon acknowledged its obligation to make next-generation facilities and capabilities available to competitors through its PARTS wholesale tariff offerings. See MCI at 13-14, Att. 1. This obligation did not discourage investment. Even when section 251 unbundling obligations applied to broadband facilities, the BOCs publicly touted their investment in network upgrades and the cost savings they would achieve by deploying next-generation technologies in their networks. See MCI at 15. And since narrowband and broadband services are provided over the same networks, most of the same design requirements and support systems applicable to broadband unbundling under section 271 have already been incurred. Any costs associated with providing access to broadband capabilities under section 271 would be purely marginal, recoverable in wholesale rates, and insufficient to outweigh the obvious "detriment[] to competition." Allegiance at 9.

Like the BOCs, CWA's public interest argument rests solely on the dubious assumption that excusing BOCs from their section 271 unbundling obligations for broadband would "accelerate[] deployment of advanced networks." CWA at 1. CWA and the BOCs do not explain why Verizon would not want the additional revenues, increased utilization, and lowered unit costs that other carriers would bring to its network – or why such wholesale competition would not enable Verizon to expand its network upgrades, and its broadband market, faster and at lower cost. See Sprint at 18. Verizon's

petition would not increase investment. It would "hinder broadband deployment and stifle the growth of facilities-based competition." Z-Tel at 21.

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